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CURRENT EVENTS.

IT is to be hoped that in appointing a successor to the lamented Justice Stanley Matthews upon the supreme bench the president will be actuated, not by a desire to reward a politician for faithful party service, but rather to recognize profound legal ability, eminent scholarly attainments, incorruptible integrity and fearless honesty, the eminent lawyer and just judge. Two names are already favorably mentioned as worthy to fill the important vacancy, Judges Cooley and Gresham, and the appointment of either of these eminent jurists would give unqualified satisfaction both to members of the legal profession as well as to all who are interested in having the supreme law of the land justly and fearlessly interpreted. They possess in a rare degree the high qualifications which the exalted position requires, long, honorable and famous experience upon the bench, profound knowledge of jurisprudence, unswerving impartiality and untiring industry; and while it is difficult generally to find one who can meet these requirements, should either Judge Cooley or Judge Gresham be honored with the appointment there can be no mistake made in the selection.

IT is a noticeable fact that while there are many distinguished lawyers who are both able and willing to serve their country on the supreme tribunal of the United States, one can suggest but few names of sufficient prominence and qualification for the vacancy now existing therein. The lawyer who devotes himself exclusively to the practice of law and takes no part in political affairs is scarcely known outside of the locality where he resides. It is seldom that he is engaged in a case that arouses public interest, and but few people hear of him. Most lawyers who have acquired a national reputation have had attention called to them by a participation in matters of public interest rather than by any brilliancy in the practice of their profession, and deserve the reputation of distinguished statesmen or politicians rather than eminent lawyers. It is to be regretted that our really great lawyers who deserve prominence from eminence and success in their profession alone are so little known, even by those who are otherwise well informed.

THE recent death of Sidney Bartlett, LL. D., of Boston, removed from the bar of this country probably the oldest practitioner as well as one of its most distinguished members. At the time of his death he had reached the advanced age of ninety years and continued in practice up to his last fatal illness. A few days before his death he was engaged in consultation with the directors of a railroad corporation of which he was general counsel. His extreme longevity furnishes a contradiction to the general notion that lawyers are short-lived.

J. W. DONOVAN, the eminent advocate, says: sense, reason, equity, wise selection of jury, kind and manner of witnesses and right conduct of counsel in urging his rights, will win a lawsuit. What is wise with a jury and what is unwise, men differ on; some urge too much; others too little; others never put the right thing in the right way. Law is a science. A good trial is a fine art. To win is the object; to lose is the dread. The sting of defeat heals slowly. The flush of victory brings business. The loss of a book account may be the loss of thousands. The loss of a case may ruin a home. The absence of a witness may mean a prison for a life-time. The power of a story may save a father to his children. The turn of a case is like the wind in winter, we know not its direction save as we feel it. What a science, what an art, what test of genius, what a forum for wisdom and eloquence, is a trial before a jury of twelve men with a nation for an audience!

NOTES OF RECENT DECISIONS.

A QUESTION of jurisdiction of the United States courts, under the act of congress of March 3, 1875, came before the Supreme Court of the United States in the case of Morris v. Gilmer, 9 S. C. Rep. 289. It was there held that the circuit court is bound to dismiss a suit depending for federal jurisdiction upon the non-residence of the plaintiff, when it is made to appear that he is not in fact a non-resident, and that, while the fact that a change of domicile is induced for the purpose of invoking federal jurisdiction does not affect the right, yet where the sole object in removing from one State to another is to be enabled to sue in the federal court, and the removal is without any present intention to remain permanently or for an indefinite time, but with a present intention to return as soon as the purposes of the suit are accomplished, there is no change of domicile. The court says:

The case presents no question of a federal nature, and the jurisdiction of the circuit court was invoked solely upon the ground that the plaintiff was a citizen of Tennessee, and the defendants citizens of Alabama. But if the plaintiff, who was a citizen of Alabama when the suit in the State court was determined, had not become, in fact, a citizen of Tennessee when the present suit was instituted, then, clearly, the controversy between him and the defendants was not one of which the circuit court could properly take cognizance; in which case it became the duty of that court to dismiss it. It is true that, by the words of the statute, this duty arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction. But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Railway Co. v. Swan, 111 U. S. 379; Bridge Co. v. Otoe Co., 120 U. S. 225; Grace v. Insurance Co., 109 U. S. 278; Blacklock v. Small, 127 U. S. 96. These were cases in which the record did not affirmatively show the citizenship of the parties, the circuit court being without jurisdiction in either of them unless the parties were citizens of different States. But the above rule is equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown, in some appropriate mode, to be untrue. While under the judiciary act of 1789 an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, the act of 1875 imposes upon the circuit court the duty of dismissing a suit, if it appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. Williams v. Nottawa, 104 U. S. 209; Farmington v. Pillsbury, 114 U. S. 138; Little v. Giles, 118 U. S. 596. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal. It is contended that the defendant precluded himself from raising the question of jurisdiction, by inviting the action of the court upon his plea of former adjudication, and by waiting until the court had ruled that plea to be insufficient in law. In support of this position Hartog v. Memory, 116 U. S. 588, is cited. We have already seen that this court must, upon its own motion, guard against any invasion of the jurisdiction of the circuit court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the circuit court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits. Metcalf v. Watertown, 128 U. S. 586. Nor does the case of Hartog v. Memory sustain the position taken by the defendant. In that case the citizenship of the parties was properly set out in the pleadings, and the cause was submitted to the jury without any question being raised as to want of jurisdiction, and without the attention of the court being drawn to certain statements incidentally made in the deposition of defendant against whom the verdict was rendered. After verdict the latter moved for a new trial, raising upon that motion, for the first time, the question of jurisdiction.

AN interesting question involving the right of the Chicago board of trade to withhold telegraphic information was decided by the Supreme Court of Illinois in the case of New York & Chicago Grain & Stock Exchange v. The Board of Trade of the City of Chicago, 19 N. E. Rep. 855. There it was held that though the Chicago board of trade is a private corporation and the business transacted by it daily is of a private nature, yet, the board having for many years permitted and invited a telegraph company to transmit, during the sessions of the board, to all persons who choose to pay for the information, reports of the dealings of the board, fluctuations in prices, etc., and the information so obtained, having in consequence become of essential importance to the commercial world, such information has become impressed with a public trust, and the board cannot now treat it as purely private, and withhold it from all but a favored few. Baker, J., after reviewing at length the object of the Chicago board of trade, its rules and customs, and mode of doing business, says:

This market news is a species of property, and if the statistics with reference to the individual business of

the members of the association, and the aggregate business of its members, had from the start been gathered and compiled at the expense of its members, and for their sole use, it may be it would have been strictly private property, held in trust by the board for the use and benefit of such members, and wholly free from any public interests therein. But the board did not so exercise its franchises, and so conduct its business, but admitted the telegraph companies to the floor of its exchange, and permitted and encouraged them, from day to day and year after year, to gather these statistics of the dealings on the board, and telegraph them immediately as they were made throughout the land, to whomsoever would pay for such information, until the business of the country had adapted itself to these means and appliances, and the point was reached when the quotations upon the board were puissant to determine the market values of the products of the country, and all persons dealing in such products could not without the knowledge and benefit of these immediate quotations intelligently and safely so deal. The facts that the board of trade is a private corporation, and that the dealings between its members are private business, such as is transacted between dry goods, grocery, and commission merchants, and that the statistics of these dealings collected as we have stated are private property, are not conclusive that such statistics are not charged with a public interest, and that there is no duty due the public in respect thereto. In the case of Munn v. Illinois, 94 U. S. 113, the Supreme Court of the United States recognized and followed the doctrine that when private property is devoted to a public use, and becomes affected with a public interest, it ceases to be *juris privati* only, and is subject to public regulation. Assuming these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessary to all alike, common to all, and upon equal terms. The doctrine as applied to the matter of these quotations, would forbid that a monopoly should be made of them by furnishing them to some, and refusing them to others who are equally willing to pay for them and to be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them. The market information here involved is not collected by the board merely for the use of the members of the association. For many years it was gathered and disseminated by the telegraph companies, and sent to all alike who would pay for it, wholly regardless of any question of membership in the board. The change that has been made by section 20 of rule 4 in respect to this commercial news department seems to be more colorable than substantial, and appears to be intended merely to enable the board to make a monopoly of such news. At first the telegraph companies by their paid agents gathered the statistics and telegraphed them from the floors of the exchange. Now, the board appoints and pays the agents who collect the statistics, and transmit them to the central telegraph office of the Western Union Telegraph Company, from whence they are distributed to the approved correspondents; but nine-tenths of the expense of this service of collecting the market reports is refunded to the board by the telegraph company. The question here is not one of withholding altogether instantaneous quotations and information respecting the prices at which grain and provisions are being sold upon the market of the exchange, nor one of discriminating between its own members and such persons as are not members in giving such information. Before the board itself assumed to control the sending of this news, no discrimination was made in distributing it between those who were and those who were not members of the board, and since the change was made a very large proportion of the approved correspondents are not members, and the rule contemplates that persons other than members should be such correspondents. The question is, can the board so conduct its affairs for a long term of years as to create a standard market for agricultural products, and, acting in concert or combination with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, and until by the usage and custom of merchants, thus advanced by the methods adopted by the board and telegraph companies, such instantaneous quotations become necessary to the successful and safe transaction of business, and until such system has become impressed and affected with a public interest, and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements, and pay for the information desired, say that one shall and another shall not have such information? If the board has such right, and these corporations are lawfully permitted so to do, then they have the power to create monopolies, and dictate who shall deal in the agricultural products of the country, and at will impoverish or enrich merchants, shippers, and producers. It is vain to say that the ordinary newspaper reports of the state of the market are all that are necessary to legitimate dealers in grain and provisions. The business of the country has outgrown such condition, and this very largely through the methods adopted and introduced by appellees themselves. The fact that 1,400 persons, firms, and corporations are in receipt of these instantaneous market reports, and are willing to pay therefor the large fees and charges demanded of them for the receipt of the same, is proof positive that a business advantage is gained by immediate knowledge of the condition of the market. The persistent efforts of the board of trade itself to control these market reports are an indication of their estimate of their value. There is no question involved in this case of gambling contracts, or of so called "bucket-shops." There is no evidence in the record tending to show that appellant is engaged in a gambling business, or dealing in puts and calls, and it is admitted that the business it is doing is not in violation of law. We think the case made by the bill of complaint and the proofs bring it within the rule announced by the Supreme Court of the United States in Munn v. Illinois, *supra*, and in our opinion it was error in the circuit court to dismiss the bill for want of equity, and error in the appellate court to affirm the decree of dismissal.

AN interesting question of principal and agent in the law of insurance was decided by

the Supreme Court of Appeals of West Virginia, in the case of Deitz v. The Providence Washington Insurance Co., 8 S. E. Rep. 616. There, a husband took out a policy of insurance in his own name on property belonging to his wife. The policy contained a provision that if the insured is not the absolute owner of the property it must be so expressed in writing in the policy. The husband, when effecting the insurance, stated to the agent of the company that the property belonged to his wife. This was a suit on the policy by the husband for the use of the wife. The court in sustaining the action, says:

It is a well-settled rule of law that where a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument, but upon the facts (1) that the act is done in the exercise and (2) within the limits of the powers delegated to the agent, and these are necessarily open to inquiry by evidence. In Browning v. Insurance Co., L. R. 5 P. C. 263, it was held that where an insurance broker takes out a policy of insurance in his own name upon his principal's goods, the latter may sue upon the policy in his own name. In cases of this kind, the liability of the principal, as well as the rights of the other party, depends upon the act done, and not merely the form in which it is executed. If the agent is clothed with the proper authority, his acts bind the principal, although done in his own name. The only difference is that, where the agent contracts in his own name for an undisclosed principal, who has employed him, he adds his own personal responsibility to that of his principal. As to the admissibility of parol evidence to qualify the written contract, there is as much objection to letting it in for the purpose of enabling the principal, not named in the contract itself, to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is that parol evidence is admissible for the purpose of introducing a new party, but never for discharging an apparent party to the contract. Jones v. Littledale, 6 Adol. & E. 486; Sims v. Bond, 5 Barn. & Adol. 393. It is the constant course to admit parol evidence to show whether the contracting party is agent or principal. Wilson v. Hart, 7 Taunt. 295. The agent's right to sue in his own name, where the instrument is in terms payable to him, is the same whether it be a promissory note, bill of exchange, check, bill of lading, policy of insurance, bond, and the like instances. 1 Walt, Act. & Def. 279, and cases cited. In Colburn v. Phillips, 13 Gray, 64, it was held: "An agent may sue on a written agreement made by him in his own name in behalf of his principal." Rhoades v. Blackiston, 106 Mass. 334. * * * * But it is insisted for the defendant that the plaintiff by the contract of insurance represented that he was the owner of the property, and, as he had in fact no interest in the property, the contract is, by the terms of the policy, void. It is true that the policy is in the name of the plaintiff, John K. Deitz, and insures the property as his; and it is also true that the policy provides that, if the property is held in trust, or be a leasehold or other interest not amounting to absolute or sole ownership, it must be so represented in the policy in writing; otherwise the insurance as to such property shall be void. But the statement of facts filed by the plaintiff alleges that the plaintiff effected the insurance as the agent of the wife, the said Sarah E. Deitz, and at the time informed the agent of the defendant that the property belonged to his wife. In Hunt v. Insurance Co., 22 Fed. Rep. 563, it was held: "Where a company's policies provide that 'any interest in property insured not absolute, or that is less than a perfect title, must be especially represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void,' it is the duty of the agent who makes the contract in behalf of the company, if he knows that the property upon which the insurance is desired belong to the applicant's wife, to state that fact in the policy, and if he fails to do so the policy will not be invalid on that account." And in the same case it was further held that "a husband who has taken out insurance as his wife's agent, upon her property, in his own name, may sue in his own name for her benefit in case of loss." It is a general principle, well-settled by the authorities, that agents of an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the company in all they do in preparing the application, or in any representation they may make as to the character or effect of the statements therein contained; and when, either by his instruction or direct act, such agent makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicants, the error is chargeable to the company. This rule is not affected or changed by a stipulation inserted in the policy that the acts of such agent in making out the application shall be deemed the acts of the insured unless written in the application or expressed in the policy. Kausal v. Assoc., 31 Minn. 17; Woodbery v. Ins. Co. 31 Conn. 517; Travis v. Insurance Co. 28 W. Va. 584.

THE question of the police power of a State, involving rights of railroad companies, came up in a new form before the Supreme Court of Alabama, in the case of L. & N. R. R. Co. v. Baldwin, 5 South. Rep. 311. There it was held that an act of the legislature of 1887, requiring all persons employed by railroad companies, in any capacity, calling for discrimination of color signals, to be examined by a State board of examiners as to their ability to distinguish colors, and making it a misdemeanor to accept or continue in such employment without a certificate from the examiners, is unconstitutional, as depriving persons of property without due process of law, in so far as it requires the fees for such examinations to be paid by the railroad companies. The court is divided on the question, Clopton, J., dissenting in an

exhaustive opinion. The majority of the court say:

The statute under consideration attempts to impose on the railroad corporations, without their consent, and whether they will or not, the expense of the examination of certain classes of their employees, for the purpose of determining their fitness for the service. Is this not a mere legislative edict that one person (artificial) shall, without his consent, pay for services rendered to another? This is not "due process of law." Private property shall not be taken for private use. These are constitutional guaranties, and corporations are as much under their protection as natural persons are. The case of Morgan v. Louisiana, 118 U. S. 455, rightly interpreted, is not opposed to the views expressed above, and furnishes no warrant for the statute we are interpreting. The question in that case arose under the quarantine laws of Louisiana, enacted for the purpose of keeping out contagious diseases. To allow vessels to land in New Orleans, not having a bill of health free of contagious or infectious diseases, would be to greatly imperil the inhabitants of the city. The quarantine inspection or examination was required primarily for the safety of the city, but secondarily and largely for the benefit of the vessel. If found free from disease, she could at once proceed, complete her voyage, and come into port. The benefit of the inspection was thus largely the vessel's, and furnished a sufficient consideration to uphold the charge made against her. In the case of Railway Co. v. Alabama, 9 S. C. Rep. 28, the question we have been considering was not, and could not be, raised. Hence the remark of the eminent jurist who prepared the opinion in that case is not an authoritative adjudication. * * * The law under consideration, passes beyond the legitimate domain, of the police power, and reaches ground forbidden by the prohibitions of the constitution. It is not denied that the legislature has the power to regulate the business of common carriers engaged in running railroads in this State by a reasonable exercise of its police power, having in view the preservation of the public safety. Smith v. State, 85 Ala. 341; Smith v. Alabama, 124 U. S. 465; McDonald v. State, 81 Ala. 279. It may also, in the lawful exercise of this power, require the examination of railroad employees for color-blindness, or other defects of vision, as done in this case, and may require a certificate of personal qualification for the service in question. Baldwin v. Kouns, 81 Ala. 272. As to these propositions there is no difference of opinion among the members of the court. Such a certificate, however, is in the nature of a personal license to the employee. It is mainly and primarily for his benefit; as much so as the personal license or diploma of a lawyer, physician, druggist, or any other person engaged in any other employment would be. It follows his person, unless restricted, anywhere in the territory of the sovereignty granting it, and in whosesoever employment the license may be engaged. It is only incidentally beneficial to the employer, so long as the employment may subsist. It is not the property of the employer, but of the employee. The debt incurred for the service rendered in making the examination is therefore the debt of the latter, not of the former. The law making power can enact no edict by which a legal liability for the debt of one person can be fastened on another without due process of legal proceedings, according to the rules and forms established for the protection of private rights. It cannot take the property or money of one person, and give it to another, by naked transfer, nor impose a liability on one person for the private benefit of another, in the absence of some relation between the parties which brings the case within the sphere of the police power. There is a line where taxation may become spoliation. So laws, under the guise of police regulations, may reach the constitutional dead-line of property confiscation. It is impossible to forecast the logical results which may practically flow from the opposite conclusion. Farmers might as well be compelled to pay the licenses of commission merchants employed in sampling their cotton; druggists, for the diplomas of their clerks; the patrons of schools, for certificates of qualification required for teachers; patients, for the diplomas of doctors; or clients, for those of lawyers. No precedent known to us among the adjudged cases goes to this extent, or lays down any principle which, in our opinion, would support the constitutionality of the law under consideration, so far as it seeks to make the railroad companies liable for the expenses incurred in the examination of employees under the provisions of the act.

THE disputed question as to when the statute of limitations begins to run against a stockholder's liability for unpaid subscriptions to capital stock of a corporation was considered by the Supreme Court of Georgia in the case of Glenn v. Howard, 8 S. E. Rep. 636. The case was argued some time ago, and a decision held up in order to get a decision of the Supreme Court of the United States upon a similar question, but the latter has not yet been rendered. In this case, the company, whose officers were authorized to make calls for unpaid subscriptions, but who had failed to do so, made an assignment for the benefit of creditors, without empowering the assignee to do so. The court, some years thereafter, directed that a call be made upon the subscribers for their unpaid subscriptions. Defendant contended that the action was barred by the statute of limitations, and the court below sustained this claim. The supreme court reversed that decision, saying:

Under the facts alleged in the declaration, was the cause of action barred? The Supreme Court of Virginia, in a similar suit, involving the same question (Vanderwerken v. Glenn, 6 S. E. Rep. 806), held that the statute of limitations did not commence to run until after the call was made, under the decree above referred to. The Supreme Court of Maryland, when the question came before it, held to the same effect. Glenn v. Williams, 60 Md. 95. The Supreme Court of Alabama, in a case involving the same question (Glenn v. Semple, 80 Ala. 159), likewise held that the statute of limitations did not begin to run until this call was made. Here, then, are three courts of last resort of different States of the Union that have directly decided the question made in the present case. We are aware that there is a decision to the contrary by Judge Brewer, of the United States circuit court (Glenn v. Dorsheimer, Cir. Ct. Mo. 23 Fed. Rep. 695), in which it was held that where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of

its creditors, the liabilities of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately. And this is the only decision to the contrary that we have been able to find directly upon the question. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction—and I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer; but the weight of authority is unquestionably against the ruling of the court below in this case. Under the act incorporating this company, a call was to be made upon the stockholders for their unpaid subscriptions, whenever necessary, by the president and directors of the corporation. No such call was ever made, and in the deed of assignment no authority was given to the assignee to make a call; and it is a rule in chancery, well recognized and uncontroverted, that wherever the subscribers fail to pay up their stock, and the officers of the corporation will not make the call, a court of chancery will make it, at the instance of any creditor, as was done in this case. When the call was made under the decree in this case, it became a call as effectually as if it were made by the officers of the corporation, who were authorized by the charter to make it. Until this call was made, the statute of limitations did not begin to run. Cited for the plaintiff in error: Glenn v. Foote, 36 Fed. Rep. 824; Glenn v. Semple, 80 Ala. 159; Glenn v. Williams, 60 Md. 95; Vanderwerken v. Glenn, 6 S. E. Rep. 806. Cited for defendant in error: Thomp. Liab. Stockh. § 291; Glenn v. Dorsheimer, 23 Fed. Rep. 695; Sawyer v. Hoag, 17 Wall. 610; Railroad Co. v. Thomas, 2 Phila. 344; Eppright v. Nickerson, 78 Mo. 482; Haton v. Dana, 101 U. S. 214; Upton v. Tribilcock, 91 U. S. 46; Sanger v. Upton, *Id.* 56; Webster v. Upton, *Id.* 65; Terry v. Anderson, 95 U. S. 630; Taylor v. Holmes, 127 U. S. 493.

THE Supreme Court of California, in Marriner v. Dennison, 20 Pac. Rep. 386, decide that a complaint in an action for breach of a contract to convey real property, showing the contract to be for the conveyance of lots of certain numbers in defendant's subdivision of the M tract, but not alleging any extrinsic facts by which the lots may be identified, is bad. The description in such contract being insufficient, the memorandum of the contract is inadmissible in evidence. The court says:

The real estate is described in the agreement as lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract. In what city, county, State, or country the land is situated does not appear. If the instrument were one attempting to convey title to property its insufficiency would be apparent. But the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. Stanley v. Green, 12 Cal. 162; Lick v. O'Donnell, 3 Cal. 63; Fry, Spec. Perf. 159 *et seq.*; Torr v. Torr, 20 Ind. 118; Colerick v. Hooper, 3 Ind. 316; Baldwin v. Kerlin, 46 Ind. 426; Browne, St. Frauds, § 385; McConnell v. Brillhart, 17 Ill. 360. But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus, if the description were "my" farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were "a" farm in Los Angeles county, it could not be rendered certain by the allegation of such extrinsic matter. Browne, St. Frauds, § 396; Baldwin v. Kerlin, 46 Ind. 426, 431. It is not sufficient to allege that by the imperfect description given in the contract the parties intended to convey certain property. Browne, St. Frauds; Baldwin v. Kerlin, *supra;* Ryan v. Davis, 6 Pac. Rep. 339; Eggleston v. Wagner, 46 Mich. 610; Bowers v. Andrews, 52 Miss. 596; King v. Wood, 7 Mo. 389; Hudson v. King, 2 Heisk. 560, 572; Clark v. Chamberlin, 112 Mass. 19; Gigos v. Cochran, 54 Ind. 593; Newman v. Perrill, 73 Ind. 153; Ferris v. Irving, 28 Cal. 645; Richards v. Snider, 3 Pac. Rep. 178. It is not enough, as we have said, to allege that by such incomplete description the parties intended to convey a certain tract of land. Such extrinsic facts must be alleged as will, in connection with such description, show that the particular piece of land was intended. If the facts alleged, together with the description set out, are not sufficient to identify the land, the contract must be held to be void for uncertainty. * * * * Applying these well-established rules to the case before us, we are of the opinion that, properly aided by the allegation of extrinsic facts, the description in the contract might have been sufficient. If, for example, it had been alleged that the defendant was at the time of the contract the owner of lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract, situate in lot 10, block O, of the San Pasqual tract, in the county of Los Angeles, State of California, according to the map of said subdivision, on record in Book 12, page 29, of Miscellaneous Records in the office of the recorder of said county, and upon which map said lots are delineated; that said lots were the only lots of said numbers, of any subdivision of defendant in any tract of land known as the "Magee Tract;" that said lots were examined by the parties hereto, before making said contract, and were verbally agreed upon as the ones for which the said contract was to be executed, and were the lots and property referred to therein, and the said subdivision was the only one then owned by the defendant, or known or designated as the "Dennison Subdivision of the Magee Tract," —we think the complaint would have been sufficient in this respect. But the complaint under consideration contains no such allegations, or any others tending to aid the imperfect description set out in the contract. It simply alleges that, by the description given, it was the intention of the parties that the tracts of land specifically described in the complaint should be conveyed. But we have shown that this is not enough. The allegation that the parties intended to convey certain property is the allegation of a mere conclusion. Such intention must appear, as we have said, from the description given, and such extrinsic facts as are alleged in aid of it. As the description, standing alone, is admittedly insufficient, and no facts in aid of it are alleged, the complaint must be held to be bad for that reason.

REMOVAL OF CAUSES UNDER THE ACT OF 1887.

On the 3d of March, 1887, congress passed an act to determine the jurisdiction of the circuit courts of the United States and to regulate the right of removing causes to them from the State courts. This right had already been made the subject of several statutes, and the law, as interpreted by numerous and well-considered judgments of the courts, had come to be regarded as definitely settled and easily understood. The new act, however, in attempting to remodel the whole scheme of the jurisdiction of the federal courts, has introduced the most radical changes in the subject of the removal of causes, and in consequence of an unfortunate lack of perspicuity, it renders necessary a re-consideration of the whole subject, in order to determine the rights of litigants, and throws upon the courts the ungrateful task of searching out the meaning of the legislators from a confused and perplexing congeries of statutory directions. Indeed, as first officially promulgated, the act was seen to abound in errors of grammar and orthography, even to the extent of making some of its sentences absolutely nonsensical. This was found to be due to a faulty enrollment of the bill, and on August 13, 1888, an act was passed "to correct the enrollment" of the act of 1887, whereby the latter statute was re-enacted in correct and (comparatively) intelligible language. This, however, does not go far enough to remove the grave doubts and questions which have arisen as to the meaning of some of its provisions and their proper application by the courts. It is proposed, in this article, to notice briefly the more important changes introduced by the act of 1887, as exemplified and explained by the decisions.

Policy of the Act.—In form, the act of 1887 is an amendment to the act of March 3, 1875, upon the same subject, and all the important provisions of the latter statute, so far as concerns the right of removal, are superseded by the substitution of new sections, so that practically the act of 1875 goes out of existence and that of 1887 takes its place. It is very apparent that the design of the act of 1887 is to restrict the right of removal within much narrower limits than before existed. It is not by any means an enlarging statute, but its policy of restriction is manifested both by the additional barriers which it raises against removals and the increased stringency of the conditions imposed and the procedure prescribed.[1] Indeed, it is held that this intention is so clear that the act must be strictly construed against any one seeking to evade the additional requirements which it puts upon the right of removal.[2]

Statutes Repealed.—The statutes upon the subject of removal of causes which have been important and controlling, and of general application, are the act of 1789 (Judiciary Act) which was repealed by the act of 1875; the act of 1866, also repealed by that of 1875; the act of 1867 ("prejudice and local influence act"); and that of 1875. In regard to the prejudice and local influence act of 1867, it was held to remain in force and unrepealed by the statute of 1875.[3] But it is much more difficult to determine whether it stands untouched by the enactment of 1887, or is superseded by the corresponding provisions of the last-named law. Without going into a discussion of the question here, it may be stated that the weight of authority, so far as yet given, decidedly inclines to the view that the provisions of the earlier act are inconsistent with those of the later and it is therefore superseded.[4] If we accept this view, it follows that the act of 1887 stands as the only statute now in force on the subject of the removal of causes, except some minor provisions not of general applicability.[5]

What Suits Removable.—It may be stated in the most general way that the same actions

[1] Wolf v. Chisolm, 30 Fed. Rep. 881, where Wallace, J., said "it was the obvious purpose of the act of March 3, 1887, to restrict the right of removal of an action from a State court to the circuit court, as it then existed; the right is restricted as to the parties who can exercise it, as to the classes of actions in which it can be exercised, and as to the time at which an election to exercise the privilege must be made."

[2] Dwyer v. Peshall, 32 Fed. Rep. 497.

[3] Hess v. Reynolds, 113 U. S. 73; Dillon on Removal of Causes, § 24*b*.

[4] Whelan v. New York, etc. R. R., 35 Fed. Rep. 849; Southworth v. Reid, 36 *Id.* 451; Short v. Chicago, etc. R. R., 34 *Id.* 225. Compare Fisk v. Henarie, 32 *Id.* 417; S. C., 35 *Id.* 230; Hills v. Richmond & D. R. R., 33 *Id.* 81.

[5] The act of 1887 expressly excepts from its repealing clause §§ 641, 642, 643, and 722, and title 24, of the Revised Statutes, and also the act of March 1, 1875. These relate to "civil rights," their protection and enforcement, and to suits against revenue officers.

are now removable as heretofore, except that the amount in controversy must exceed $2,000, instead of $500, that only a non-resident defendant can remove, instead of either party, that the time within which the privilege must be claimed is much restricted, and that the preliminary procedure is, in some cases, much altered. An ambiguity arises in § 2 of the act of 1887, in consequence of the fact that the right of removal is there limited to suits "of which circuit courts are given jurisdiction by the preceding section." The preceding section (§ 1 of the act) enumerates suits of a civil nature, at law or in equity, involving more than $2,000, arising under the constitution, laws, or treaties of the United States, or in which the United States are plaintiffs, or between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign States, citizens, or subjects. "It has been thought by some," says Judge Wallace, "that this phrase restricts the right of removal to suits in which the particular circuit court to which a defendant seeks to resort has not only jurisdiction of the subject-matter but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. That phrase was apparently used to dispense with a recapitulation of the several conditions which determine the jurisdiction of the subject-matter in the first section. The word 'jurisdiction' refers to jurisdiction over the subject-matter, to the general jurisdiction of circuit courts, and means a jurisdiction which would enable any circuit court to entertain and determine the controversy if the parties were before it." [6]

Citizenship as Ground of Removal.—The first section of the act of 1887 provides that "no civil suit shall be brought before either of said courts [circuit or district] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." And a case decided soon after the passage of the law held that, under this section, the circuit court could not in any case take cognizance of a suit brought against a party in a district of which he was not an inhabitant, and that the second section did not authorize the removal of a suit brought in a State court against a party not an inhabitant of the district; since the right of removal is limited to cases in which the "preceding" (first) section gives jurisdiction to the circuit courts.[7] But it was plain that the learned judges, in this decision, overlooked the sentence in the act next following the one quoted above, viz: "But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant." And accordingly the decision cited above was disapproved in numerous cases,[8] and was afterwards expressly overruled by the same court which had rendered it.[9] It may now be regarded as practically settled that these two clauses taken together mean this: "When the jurisdiction depends upon the existence of a federal question, or upon grounds other than the citizenship of the parties, the defendant must be sued in the district of his domicile; but when the jurisdiction depends upon the citizenship of the parties, the suit may be brought in the district in which either the plaintiff or the defendant resides." [10] It is to be noticed, however, that the right of removal, under this act, is restricted to *non-resident* defendants; and hence a defendant who resides in the State in which suit is brought cannot remove the cause, although the plaintiff be a resident of another State.[11]

Suits by Assignees.—The first section of the act of 1887 also contains the following clause: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or

[6] Vinal v. Continental Co., 34 Fed. Rep. 228.

[7] Yuba County v. Pioneer Gold Min. Co., 32 Fed. Rep. 183.

[8] Fales v. Chicago, etc. R. R., 32 Fed. Rep. 673; Bank of Winona v. Avery, 34 *Id.* 81; Short v. Chicago, etc. R. R., *Id.* 225; Tiffany v. Wilce, *Id.* 230.

[9] Wilson v. Western Union Tel. Co., 34 Fed. Rep. 561.

[10] St. Louis, V. & T. H. R. R. v. Terre Haute & I. R. R., 33 Fed. Rep. 385, Gresham, J. See Halstead v. Manning, 34 Fed. Rep. 565.

[11] Weller v. Pace Tobacco Co., 32 Fed. Rep. 860. See further Cooley v. McArthur, 35 *Id.* 372; Gavin v. Vance, 33 *Id.* 84; Rawley v. Southern Pac. R. R., *Id.* 305; Loomis v. New York Gas Coal Co., *Id.* 353; Pitkin Co. Min. Co. v. Markell, *Id.* 386; Swayne v. Boylston Ins. Co., 35 *Id* 1; Seddon v. Virginia, etc. Co., 36 *Id.* 6.

of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." Under this clause it is understood that the federal court has "jurisdiction of actions by assignees—where the assignor was not competent to sue in that court—only in cases of foreign bills of exchange and negotiable securities payable to bearer and made by a corporation," the latter being "the class of securities made by corporations, railroad companies and the like, which are sold in open market and negotiable by delivery."[12] There was a similar prohibition against suits by assignees, where the assignor could not sue in the federal court, in the act of 1875. But since, from the wording of that act, this clause, relating to the original jurisdiction of the circuit courts, could not be read by implication into the following section, governing the removal of causes, the supreme court held that while an assignee could not bring an action originally in the circuit court unless the assignor could have done so, yet he could bring the action in a State court and thence remove it into the circuit court, if the other prerequisites existed.[13] Now, however, under the act of 1887, this will no longer be possible, since, as we have seen, the second section of that act restricts the right of removal to cases of which the circuit court could take original cognizance by the first section.

Separable Controversies.—The third clause of the second section of the act of 1887 provides for the removal of a "separable controversy," on the ground of diverse citizenship,[14] using precisely the same language as appears in the second clause of the second section of the act of 1875, except that it restricts the right of removal to the defendant, instead of leaving it open to either party as before. And it is held that this clause applies to that class of cases only where there are two or more controversies involved in the same suit, one of which is wholly between citizens of different States; and under the act of 1887 the right of removal in the cases last mentioned is limited to one or more of the defendants actually interested in such separable controversy and does not extend to the plaintiffs therein.[15] This decision merely follows the line of cases which established the construction of the corresponding clause in the act of 1875.[16]

Prejudice and Local Influence.—The most perplexing and difficult of the questions which have arisen under the act of 1887 are those relating to the proper construction and interpretation of the clauses regulating the removal of causes on the ground of "prejudice or local influence." Whether the Local Prejudice act of 1867 (Rev. Stat. § 639, subd. 3) is or is not repealed by the new statute—whether or not the right now depends upon the amount in controversy—what is the proper practice in effecting the removal—how it shall "be made to appear" to the circuit court that such prejudice or local influence exists—these are all points which stand urgently in need of a finally authoritative decision. The topic offers an inviting field for discussion, but as it has been treated in an able and interesting article from the pen of Judge Maxwell, in a recent number of this JOURNAL,[17] I will content myself here with merely collecting the cases for the reader's benefit.[18] There is, however, one

[12] Rollins v. Chaffee Co., 34 Fed. Rep. 91. It was accordingly held that the court had no jurisdiction of an action by an assignee on a county warrantpayable to the order of a person named therein and passing only by indorsement, in the absence of an averment that the assignor was qualified to sue in that court; but it had jurisdiction of an action by the holder on one payable to bearer, such being a negotiable security made by a corporation.

[13] Claflin v. Ins. Co., 110 U. S. 81; Dillon on Removal of Causes, § 53c.

[14] "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

[15] Western Union Tel. Co. v. Brown, 32 Fed. Rep. 337. See also Anderson v. Appleton, *Id.* 855; Woodrum v. Clay, 33 *Id.* 897.

[16] Barney v. Latham, 103 U. S. 205; Corbin v. Van Brunt, 105 *Id.* 576; Fraser v. Jennison, 106 *Id.* 191; Brooks v. Clark, 119 *Id.* 502; Ayres v. Wiswall, 112 *Id.* 187; Dillon on Removal of Causes, § 25a.

[17] 28 Cent. L. J., 109.

[18] The principal decisions on the "local prejudice" clause of the act of 1887 are the following: Fisk v. Henarie, 32 Fed. Rep. 417; Hills v. Richmond & D. R. R., 33 *Id.* 81; Short v. Chicago, etc. R. R., 33 *Id.* 114; S. C., 34 *Id.* 225; County Court v. Balt. & Ohio R. R., 35 *Id.* 161; Fisk v. Henarie, 35 *Id.* 230; Malone v. Richmond & D. R. R., 35 *Id.* 625; Whelan v. New York, L. E. & W. R. R., 35 *Id.* 849; Southworth v. Reid, 36 *Id.* 451; Shedd v. Fuller, 36 *Id.* 609.

curious feature of the act of 1887 which deserves notice here, especially as it seems to be a momentary relapse from the policy of restriction and discouragement elsewhere so apparent in the statute. It is this: Whereas the act of 1867 (Rev. Stat. § 639, subd. 3) required that, in cases where there were several defendants, *all* must possess the requisite citizenship and all must join in a petition to remove on the ground of prejudice or local influence, now the act of 1887 extends the right to "any" defendant possessing the requisite citizenship; and the right of removal under this clause is not confined to cases where there is a separable controversy between the plaintiff and the defendant seeking the removal, as such cases are provided for by § 2, clause 3 of that act, and the proviso in clause 4, in relation to remanding as to resident defendants, where the parties can be separated, refers only to a remand after the suit as a whole has been removed by the non-resident defendant.[19] Nor is this provision unconstitutional, although by virtue of the removal the circuit court obtains jurisdiction of the entire cause, including controversies between plaintiff and the resident defendants. It only gives effect to the constitutional provision respecting controversies between citizens of different States, and with that view the single federal ingredient, the citizenship of defendant in another State, is controlling.[20]

Time of Removal.—Under the act of 1875, § 3, parties desiring to remove the cause were required to file the necessary petition "before or at the term at which said cause could be] first tried and before the trial thereof." Now, under the act of 1887, the defendant must take this action "at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."[21] It will be observed that this is an important restriction of the right, and that the defendant must now exercise his election, as to removing, at a much earlier stage of the cause than was before required. It is held that "by the true construction of the new act, a defendant must file his petition within the time in which, by the laws of the State or the rules of the State court, he is required to serve or file his *original* answer or plea, not within the time when he is required or may elect to file an amended or supplemental answer."[22] So far as regards a petition for removal on the ground of prejudice and local influence, under the new act (which must be filed "at any time before the trial" of the cause), it has been held that the application is made in time if made while the case is pending for trial, although there may have been any number of mistrials or trials in which the verdict was set aside or the jury disagreed.[23]

Jurisdictional Amount.—Under the act of 1875, the amount or value in controversy which was necessary to give original jurisdiction of the action to the federal court, or jurisdiction by way of removal from a State court, was $500 "exclusive of costs," but the courts held that accrued interest might be included in making up that sum.[24] The requisite amount is now set at $2,000 "exclusive of interest and costs." And further, by the statute, the amount in dispute must *exceed* the last named sum; and an action for the recovery of exactly $2,000, with interest, is not removable.[25] But an action may be maintained in the circuit court where the plaintiff's claim exceeds the jurisdictional amount, although it is made up of distinct demands of less value individually than $2,000, and although the plaintiff may have acquired such demands by assignment.[26] In

[19] Whelan v. New York, L. E. & W. R. R., 35 Fed. Rep. 849; Fisk v. Henarie, 32 *Id.* 417.

[20] Whelan v. New York, L. E. & W. R. R., 35 Fed. Rep. 849.

[21] Act of March 3, 1887, § 3. Except, however, in the case of a removal on the ground of local prejudice, when the petition may be filed "at any time before the trial" of the action.

[22] Wolf v. Chisolm, 30 Fed. Rep. 881. See this clause further construed in Dwyer v. Peshall, 32 *Id.* 497; Lookout Mountain R. R. v. Houston, *Id.* 711; McKeen v. Ives, 35 *Id.* 801; Garvin v. Vance, 33 *Id.* 84; Simonson v. Jordan, 30 *Id.* 721.

[23] Fisk v. Henarie, 32 Fed. Rep. 417. This was also the construction which prevailed in regard to the similar language used in the act of 1867. See Dillon on Removal of Causes, § 60; Vannevar v. Bryant, 21 Wall. 41.

[24] Dillon on Removal of Causes, § 51.

[25] Lazensky v. Supreme Lodge, 32 Fed. Rep. 417.

[26] Bernheim v. Birnbaum, 30 Fed. Rep. 885. In an action for damages to property by a railroad company occupying a street, the *ad damnum* of the writ and declaration was laid at $1,500, in ignorance of the act of congress of 1887 increasing the minimum limit of the jurisdiction to $2,000; but, on motion to dismiss,

a recent decision Mr. Justice Harlan observes, "I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds $2,000 exclusive of interest and costs." [27] This point is by no means clear of doubt. But upon a careful consideration of the whole context, it seems very probable that this was the real intention of the legislature, however blindly that purpose may have been expressed.

Appellate Jurisdiction of Supreme Court.—Under the act of 1875, the order of the circuit court dismissing or remanding the cause to the State court was reviewable by the United States Supreme Court on writ of error or appeal, as the case might be. Now, however, by the act of 1887, this clause is repealed and instead thereof it is provided that whenever the circuit court "shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." [28] And it is held that the proviso in § 6 of the act of 1887, concerning the jurisdiction over suits which had been removed from a State court prior to the passage of the act, relates only to the jurisdiction of the *circuit* courts, and does not confer upon the supreme court jurisdiction over an appeal from a judgment remanding a cause to the State court.[29]

H. CAMPBELL BLACK.

the plaintiff asked leave to amend by increasing the *ad damnum: Held*, that the amendment should be allowed, since it did not satisfactorily appear from the nature of the case and the circumstances shown that the damages were not in fact larger than the original claim. It is only when the court can plainly see that its jurisdiction is being fraudulently invoked that it will deny the amendment or dismiss the cause. Davis v. Kansas City, S. & M. R. R., 32 Fed. Rep. 863.

[27] Malone v. Richmond & D. R. R., 35 Fed. Rep. 625.

[28] Act of March 3, 1887, § 2, cl. 6. See Morey v. Lockhart, 123 U. S. 56.

[29] Wilkinson v. Nebraska, 123 U. S. 286.

MUTUAL BENEFIT SOCIETY — CERTIFICATE PROVIDING PAYMENT TO MEMBER—ULTRA VIRES—ESTOPPEL.

ROCKHOLD V. CANTON MASONIC MUTUAL BENEFIT ASSOCIATION.

Supreme Court of Illinois, January 25, 1889.

A mutual benefit society, organized under a statute which provides that "associations and societies which are intended to benefit the widow, orphans, heirs and devisees of the deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies," and whose certificate filed with the secretary of State declared the purpose of the organization to be "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members," issued a certificate to a member which contained a clause agreeing to pay him, on his arriving at the age of seventy years, a sum equal to the number of members in his division: *Held* (1), that such certificate is valid as a certificate payable to the member's widow or children, upon his death, but void as a certificate payable to him after arriving at the age of seventy years; and (2) that the society, although it had, from time to time, received assessments from the member, under such certificate which were paid over to persons entitled, under like certificates, was not estopped from invoking the doctrine of *ultra vires*.

This is an agreed case decided in the circuit court in favor of plaintiff in error, Charles W. Rockhold, and judgment rendered for $1,836. An appeal was taken to the appellate court, where the judgment was reversed, but not remanded. The case is in substance as follows: Defendant in error became incorporated March 30, 1874, under the general incorporation act, as a corporation not for pecuniary profit; the object of the incorporation being, as stated in its application, to give financial benefit to the widows, orphans, heirs, or devisees of deceased members. On April 9, 1874, it adopted a constitution, whereby it was provided that upon the death of a member, or upon his arriving at the age of seventy years, payment should be made of the benefits therein provided for. The membership was divided into divisions, and each member was required to pay a certain amount upon the death of a member of his division, or upon such member's arriving at the age of seventy years. More than a year after the adoption of this constiution, and while all certificates of membership contained this provision, plaintiff in error became a member of said society, received his certificate of membership, and paid his assessments under the same, without any change in the amount, until he had arrived at the age of seventy years. He then made proof of that fact, and demanded payment, which was refused. The contract provides that upon the happening of that event the board of directors shall pay to the member a sum equal to one dollar for every member of the class to which he be-

longed, but the payment is not made to depend upon the collection of the assessment; there being a surplus fund provided which was applicable to that purpose. Some time after plaintiff became a member a controversy sprang up between the society and the auditor of State, as to the legality of that provision of the constitution which provided for the payment of benefits to living members, whereupon the officers of the society ceased issuing certificates in that form; but, with the exception of that clause, all subsequent certificates were identical with that held by plaintiff. Certain efforts were also made to strike out that provision from the constitution and by-laws, but those efforts failed, except that it was transferred from the constitution to the by-laws. Plaintiff always objected to any such change, and insisted upon his rights under the original contract, and when the society refused to pay him this amicable suit was instituted to try his rights.

SCHOLFIELD, J., delivered the opinion of the court:

Two questions are presented by this record: First. Was the clause in the policy in suit, whereby defendant in error assumes to promise to pay to plaintiff in error "one dollar for each member of division A," etc., within the power vested in defendant in error by its charter, and therefore obligatory upon it when the policy was delivered? Second. If it was not within the power vested in defendant in error by its charter, and therefore not obligatory upon it when the policy was delivered, has the promise since become obligatory upon the defendant by subsequent acts of the parties? They will be considered in the order stated.

1. The familiar rule is, a corporation, public or private, possesses and can exercise no other powers than those specifically conferred in its charter, or such as are incidental or necessary to carry into effect the purpose for which the corporation was created. Among other corporations which may be organized under chapter 32, Rev. Stat. 1874, are corporations not for pecuniary profit. The provisions in that respect, pertinent here, are found in sections 29, 30, and 31. Section 29 provides that the certificate that shall be filed by the promoters of the corporation with the secretary of State shall state, among other things, "the particular business and objects for which it is formed." Section 30 provides that, upon filing this certificate, the secretary of State "shall issue a certificate of the organization of the corporation, society, or association, making a part thereof a copy of all papers filed in his office in and about the organization thereof, and duly authenticated under his hand and seal of State. * * * Upon complying with the foregoing conditions, the corporation, society, or association shall be deemed fully organized, and may proceed to business. * * *" Section 31 invests corporations thus created with the usual attributes and powers of corporations, and concludes thus: "Associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of the deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies." The organization of the defendant in error was in strict pursuance of these statutory provisions. The certificate filed by the promoters with the secretary of State declared the purpose for which the corporation is formed to be "to give financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members." This is the measure of the powers vested in the defendant in error. The certificate of the secretary of State could not, and it does not assume to, extend the corporate powers to any other purpose or object. The policy or certificate in suit, so far as material to be read in this connection, is as follows: "This certificate of membership witnesseth that the Canton Masonic Mutual Benevolent Society, in consideration of the representations made to it in the application for membership, and the sum of five dollars to it in hand paid by Charles W. Rockhold, and the sum of one and 80-100 dollars to be paid by the said Charles W. Rockhold within ten days after due notice has been served upon him of the death of a member of this society, or upon his arriving at seventy years of age, or after he has been a member in good standing for twenty-five consecutive years, each member shall be assessed and shall pay to the secretary of the society a sum according to the class of which he is a member, do promise and agree to and with the said Charles W. Rockhold, his heirs, executors, administrators, and assigns, well and truly to pay, or cause to be paid, to the said Charles W. Rockhold, or to his wife, if living, if not, to his children, or to his legal representatives, the sum of one dollar for each member of division A, within sixty days after due notice and satisfactory evidence that he is a beneficiary member, or of his death."

It is so manifest that the bare statement of the fact must be satisfactory that the promise to pay a sum of money to a person upon his arriving at a given age is not included within or incidental to a promise to pay a sum of money to his widow or his children or his legal representatives upon his death. They are, upon the contrary, as distinct and independent as undertakings can be. The former is a species of life insurance known as "endowment insurance" (Bliss, Ins. § 6, p. 7; Briggs v. McCullough, 36 Cal. 542); while the latter, under the provision of the statute quoted, is not to be deemed insurance. We are therefore of the opinion that the clause in question was *ultra vires* the defendant in error, and therefore was not obligatory upon it when the policy or certificate in suit was issued. State v. Association, 29 Ohio St. 399, and People v. Nelson, 46 N. Y. 477, are directly in point, and conclusive as to this question.

2. This court has held that, while the contract of a corporations remains wholly executory, the

corporation may interpose the plea of *ultra vires* as a defense to a suit for its enforcement; but where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefits of such performance, it cannot invoke the doctrine of *ultra vires* to defeat an action brought against it on such contact. Bradley v. Ballard, 55 Ill. 415; Darst v. Gale, 83 Ill. 136; Association v. Blue, 120 Ill. 121, 11 N. E. Rep. 331. And counsel for plaintiff in error correctly insist that this last quoted rule is conclusive of the present question. But it will be seen the present case is totally different from the cases cited. The question there was between the corporation and a third party, in regard to money received by the corporation which, in legal presumption, tended to increase the property of the corporation. Here the question is between the corporation and one of its constituent members, who is charged with full knowledge of the want of power in the corporation to make the particular contract. The assessments paid by the plaintiff were not paid to the defendant to be retained by it to increase its property, but to be paid out by it to other persons entitled thereto by virtue of beneficiary certificates or policies, and, since there is no evidence to the contrary, it is to be presumed this was done. No action, therefore, will lie by the plaintiff against the defendant to recover this money back. Murphy v. Bidwell, 52 Mich. 487, 18 N. E. Rep. 230.

The beneficiary certificate or policy is valid as a certificate or policy payable to the widow or children of the plaintiff upon his death, and void only as a certificate or policy payable to him after being a member in good standing for twenty-five years, or upon arriving at seventy years of age. Bank v. Harrison, 57 Mo. 503; Bank v. Stevens, 1 Ohio St. 235; Vanatta v. Bank, 9 Ohio St. 27; Insurance Co v. Cadwell, 3 Wend. 302; Beach v. Bank, *Id.* 583.

Whether plaintiff might have rescinded the contract, and recovered back the premium paid, is not important to inquire, since to have done so he must have acted promptly before the rights of third parties intervened. He has never offered to rescind the contract, but, upon the contrary, it is expressly agreed between the parties as follows: "That said plaintiff has since the time of receiving said certificate paid all assessments, Nos. 1 to 51, inclusive — such assessments amounting in the aggregate to $165.60, the same being all assessments for which said plaintiff was liable by virtue of holding said certificate, and being a member of said society. But in no case has said defendant corporation exercised the power of paying, or collecting benefits to be paid, to living members of said society, and in no case has the plaintiff been required by said society to pay any such assessments; the defendant believing it had no power to make any such assessments." Moreover, on the 23d of November, 1881, a little more than five years before plaintiff in error became seventy years of age, he was notified by the defendant in error that it had been instructed by the State auditor that it had no authority to insert the clause in question in the policy or certificate; and that, in consequence of such instruction, no more policies or certificates would issue with the clause in question. And it is agreed that of the 1,836 members of class A, to which plaintiff belongs, only 597 members held certificates or policies, at the date when plaintiff in error became seventy years of age, with the clause in question; and that the policies or certificates of the remaining 1,239 members were to be paid only to the widows, orphans, and heirs of deceased members; and so, instead of attempting to rescind the contract, he has acquiesced in and abided by it, with full knowledge of the extent of its validity.

It is true, as contended by plaintiff's counsel, that his rights under the contract could not be changed without his consent. But inasmuch as, at most, his rights were only to have the contract carried out as one to pay at his death, to his widow and orphans, or to rescind that contract, it is plain that his rights have not been changed or altered by any act of the corporation.

The judgment of the appellate court is affirmed.

NOTE.—*Mutual Benefit Society — Member as a Beneficiary.*—The articles of incorporation of a company, and the statutes under which it is formed constitute its charter, subject, of course, to the constitution and general laws of the State. These regulate the rights of its members and are in their nature fundamental contracts in form between the organizers, and, in practical effect, between the company and its members, which neither party is at liberty to violate.[1]

This doctrine is familiar and amply sustained,[2] and applicable alike to all corporations or incorporated companies, whether for pecuniary and charitable purposes.[3] The society or corporation and each member thereof, being thus bound and limited by the charter, cannot do what this instrument does not authorize, or what the authority under, or by virtue of which it is granted, does not permit.[4] Ordinarily, relief associations or mutual benefit societies are not authorized to provide for the payment of stipulated sums of money to persons other than the members of the family or heirs of a deceased member.[5] But their power in this respect, necessarily depends upon the construction of the laws under which they are organized; still it is usually held that they are limited to conferring the above benefits only, unless the particular society is expressly authorized to operate outside of this limit.

The court in the principal case rightly held that a certificate which promises to pay a sum of money to a member upon his arriving at a given age is not included within or incidental to a promise to pay a sum

[1] Bergman v. St. Paul Mut., etc., 29 Minn. 275; Morawitz on Corp. §§ 6, 7, 316, 380.

[2] Ang. & Ames on Corp. §§ 111, 256.

[3] Bacon on Benefit Soc. & Life Ins. §§ 47-49, 62.

[4] Rosenberger v. Washington Mut., ect., 87 Pa. St. 207.

[5] State v. Central Ohio Mut. Relief Assn., 29 Ohio St. 399; People v. Nelson, 46 N. Y. 477; State v. Mut. Prot. Assn., 29 Ohio St. 19; State v. Standard Life Assn., 38 Ohio St. 281; Nat. Mut. Aid Assn. Case, 43 Ohio St. 1; Bacon's Benefit Societies and Life Ins. § 55; Mut. Benefit Assn. v. Hoyt (Mich.), 13 Cent. L. J. 112.

of money to his widow or his children or his legal representatives upon his death. That the first undertaking is a species of insurance known as "endowment insurance," while the latter, under the Illinois statute, was not deemed insurance. Therefore, the clause of the certificate, agreeing to pay the member a certain sum upon his attaining a certain age, was *ultra vires*, the power to carry it out not having been conferred by the law under which the defendant company was organized.

May Society Invoke Defense of Ultra Vires?—But it was urged, in the principal case, that the defendant company was estopped from invoking the defense of *ultra vires*. As a general rule, stockholders and organizers of a corporation are estopped as against policy holders, from setting up the illegality or irregularity of the corporate organization.[6] So, where the question is simply one of authority to contract, arising on a question of the illegality or irregularity of organization, or of powers conferred by the charter, or the laws by virtue of which the charter exists, a party who has had the benefit of the agreement will not be allowed in an action founded upon it to contest its validity. On the other hand, it has been held that either party to the contract may set up the want of power in the the corporation to enter into the contract on the ground of public policy—the defense being regarded as that of the public.[7] Like the rules respecting corporations are equally applicable to mutual benefit societies.[8] Yet where the contract has been fully executed, as where the member dies, the society cannot invoke the doctrine of *ultra vires*.[9] This principle is well illustrated in Bloomington Mutual Life Benefit Asso. v. Blue.[10] Here the society, organized under the same laws under which the defendant company in the principal case was incorporated, issued a certificate of membership, payable to one Blue, not related in any way to the member, Bailey. The member died and Blue brought suit on the certificate. The plea of *ultra vires* was set up. The court said: "It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is that it was not expressly authorized by statute. The defendant voluntarily issued the policy, it received the premiums, and Bailey fully, so far as appears, performed all that his contract required him to do. So far as he is concerned the contract is an executed one. Now, upon the death of Bailey, when the defendant is called upon to perform its part of the contract can it refuse and defeat a recovery, by claiming that the contract is *ultra vires*. We think the law on this question is well settled, that such a defence cannot be made availing. Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received benefit from such contract, it cannot invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract."

Certificate Void in Part Only.—Although a certificate in a mutual benefit society, contains provisions contrary to law, it does not follow that the certificate is wholly void. It may be good as a certificate payable to those whom the law designates may become beneficiaries, and invalid as to other provisions, as in the principal case, a provision to pay to the member a certain sum after he had been a member in good standing for twenty-five years, or upon his arriving at the age of seventy years. And this upon the principal, as stated by Lord Coke, that "where a man doth that which he is authorized to do and *more*, then it is good for that which is warranted, and void for the rest."

The doctrine has been thus stated by the Supreme Court of Missouri: "If power be given to a corporation to do an act in a particular way * * and it adopt a different method of performance * * the act is *ultra vires* and void. If, however, the departure apply, not to the method itself, but purely to extent or quantity in an authorized feature, then the act is good up to the limit of extent or quantity, and void as to the excess. The test inquiry is, whether part of the undertaking may be cut off, and what remains be in fulfillment of the law.[12]"

6 McCarthy v. Lavasche, 89 Ill. 270; Association v. Ins. Co., 70 Ala. 121; McDonnell v. Ala. Gold Life Ins. Co. (Ala.), 5 South. Rep. 120; Aultman v. Waddle (Kan.), 19 Pac. Rep. 730.

7 Niblack on Mut. Ben. Soc. § 7. See Matt v. R. C., etc. Society, 70 Iowa, 435; 30 N. W. Rep. 799.

8 Bacon's Ben. Soc. & Life Ins. § 265.

9 Lamont v. Hotel Men's Mut. Ben. Assn., 30 Fed. Rep. 817; Lamont v. Legion of Honor, 31 Fed. Rep. 177; Folmer's Appeal, 87 Pa. St. 135. See Rice v. N. E. Assn., etc., 5 N. Eng. Rep. 815; Knights of Honor v. Nairn, 60 Mich. 44.

10 120 Ill. 121.

11 Coke Litt. 258.

12 Farmers' & Traders' Bank v. Harrison, 57 Mo. 503, 511, 512.

RECENT PUBLICATIONS.

Books Received.

A Dictionary of Law, consisting of Judicial Definitions and Explanations of Words, Phrases, and Maxims, and an Exposition of the Principles of Law: Comprising a Dictionary and Compendium of American and English Jurisprudence. By Wm. C. Anderson, of Pennsylvania Bar. Chicago: T. H. Flood & Company, Law Publishers. 1889.

Privileged Communications as a Branch of Legal Evidence. By John Frelinghuysen Hageman, Counsellor at Law, Princeton, New Jersey. The trade supplied through Honeyman & Co., Publishers of the New Jersey Law Journal, Somerville, N. J. 1889.

Lawyers' Reports, Annotated. Book I All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Edmond H. Smith, Reporter, Burdett A Rich, Editor in chief of the United States and General Digests, and the Several Reports and Judges of each court, Assistants in Selection. (1 L. R. A.) Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1888.

The Code of Evidence of the State of New York. Reported complete by the Commissioners, Hon. David Dudley Field, Hon. William Rumsey, appointed pursuant to chapter 124 of the Laws of 1887. February 1889.

The American and English Encyclopædia of Law. Compiled under the editorial supervision of John Houston Merrill, late editor of the American and English Railroad Cases and the American and English Corporation Cases. Volume VII. Northport, Long Island, N. Y.: Edward Thompson Co., Law Publishers. 1889.

In our last week's issue Volume VIII was mentioned

as having been received, which was an error. It was intended to say Vol. VII.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. IV San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

QUERIES ANSWERED.

QUERY NO. 12.

[*To be found in Vol. 28, Cent. L. J. p. 219.*]

The daughter C having died before the testator her share under the will lapsed, and at the death of A went to his residuary legatee or his personal representtatives. Williams on Executors, 1204; Tiedeman on Real Property, § 885; 4 Kent's Com. 541. If C had survived the testator, upon her death, E would be entitled to the $2,000, being her only lineal descendant. G would have no right to any part of it. 1 Blackstone Com. 208. Tiedeman on Real Property, § 665. D. P.

QUERY NO. 13.

[*To be found in Vol. 28, Cent. L. J., p. 219.*]

The husband should have joined in the quitclaim deed; except in States in which the statute empowers a married woman to convey real estate by her own deed, she must be joined by her husband in the conveyance of her separate estate: Martin v. Colbern 88 Mo. 229. R. S. Mo. 1879, § 3295, provides that no conveyance of the real estate of a married woman shall be valid unless her husband joins in the deed.

JETSAM AND FLOTSAM.

A LAWYER having wearied the court by a long and dull argument, the judge suggested the expediency of his bringing it to a close.

"I shall speak as long as I please," was the angry retort.

"You have already spoken longer than you please," answered the judge.

"DO you mean to challenge the jury?" whispered a lawyer to his Irish client. "Yis, be jabbers! If they don't acquit me, I mean to challenge ivery spalpeen of them. I want you to give 'em all a hint of it, too."

AN Indiana colored lawyer, in trying to get his client out of custody, exclaimed: "Da is a law dat's called 'habbis carcass,' an' I'ze gwine to hab de carcass ob dat client ob mine, dea' or alive!"

AT a legal investigation of a liquor seizure, the judge asked an unwilling witness, "What was in the barrel that you had?" The reply was: "Well, your Honor, it was marked 'whisky' on one end of the barrel and 'Pat Duffy' on the other; so I cannot say whether it was whisky or Pat Duffy in the barrel, being as I am on my oath."

"PRAY, my lord," said a gentleman to a late respected and rather whimsical judge, "what is the difference between law and equity courts?" "Very little in the end," replied his lordship; "they differ only as far as time is concerned. At common law you are done for at once; in equity you are not so easily disposed of. The former is a bullet, which is instantaneously and charmingly effective; the latter is an angler's hook, which plays with its victim before it kills it. The one is prussic acid; the other laudanum."

IN one of the earliest trials before a colored jury in Texas, the twelve gentlemen were told by the judge to retire and "find the verdict." They went into the jury-room, whence the opening and shutting of doors, and other sounds of unusual commotion were heard. At last the jury came back into the court, when the foreman announced: "We hab looked eberywhar, Jedge, for dat verdict—in de drawers and behind de doors; but it ain't nowhar in dat blessed room."

LAW PROFESSOR. What constitutes burglary? Student. There must be a breaking. Professor. Then, if a man enters your door and takes a ten dollar bill from your vest-pocket in the hall, would that be burglary? Student. Yes, sir; because that would break me.

A LONG-WINDED lawyer lately defended a crimina unsuccessfully, and during the trial the judge received the following note: "The prisoner humbly prays that the time occupied by the plea of the counsel for the defense be counted in his sentence."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION—Misjoinder of Causes—Parties.——A complaint by different firms who severally sold goods at different times to defendants, alleging that the goods were obtained by false representations, shows an improper joinder of parties plaintiff, and is bad on demurrer. — *Gray v. Rothschild, Sherman v. Same*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 847.

2. ADMIRALTY—Appeal—Weight of Evidence. —— On appeal in admiralty to the circuit court, where there is no decided preponderance of evidence either way, the district judge will be followed.— *Levy v. The Melville*, U. S. C. C. (N. Y.), Dec. 31, 1888; 37 Fed. Rep. 271.

3. ADMIRALTY—Jurisdiction—Contracts.——A contract to stow or load a vessel is not a maritime contract, and not enforceable in admiralty. — *Danace v. The Magnolia*, U. S. C. C. (La.), Jan. 22, 1889; 37 Fed. Rep. 367.

4. ADVERSE POSSESSION — By Lessee — Surrender of Possession.——To rebut the presumption that a lessee is holding under the lessor, a surrender of possession, or something equivalent thereto, must be made to the lessor, and knowledge of the adverse claim brought home to him. — *Bedlow v. Dry-Dock Co.*, N. Y. Ct. App., Jan. 22, 1889; 19 N. E. Rep. 800.

5. APPEAL — Allowance after Expiration of Legal Period. —— *Held*, under facts, that appellant was negligent and did not bring himself under Rev. St. Me. ch. 83, § 25, allowing an appeal, to a person who has failed to take an appeal, without fault on his part within time required by law.—*Chase v. Bates*, S. J. C. Me., Jan. 5, 1889; 16 Atl. Rep. 542.

6. APPEAL — Want of Assignment of Errors — Affirmance. —— Where there is no bill of exceptions, nor assignment of errors in the record, judgment will be affirmed, under Rev. St. Tex. art. 1037, which provides that all errors not specified by an assignment of errors shall be considered by the supreme court as waived. — *Draper v. Hillen*, S. C. Tex., Nov. 30, 1888; 10 S. W. Rep. 457.

7. APPEAL— Review — Assignment of Errors. —— An alleged error in the court below upon a question of pleading cannot be reviewed or corrected on an assignment of error as to the exclusion of evidence. — *Bewley v. Graves*, S. C. Oreg., Jan. 15, 1889; 20 Pac. Rep. 822.

8. APPEAL—Presumptions.——Where a cause is tried by a court without a jury, if there is sufficient evidence to sustain the judgment it will be presumed the court disregarded incompetent evidence.— *Batson Co. v. Lewis*, S. C. Ariz., Jan. 19, 1889; 20 Pac. Rep. 310.

9. APPEAL—Review— Objections Waived. —— An objection to a juror for disqualification, if discovered during the trial, must be then brought to the notice of the court, or it will be waived. — *Blanton v. Mayes*, S. C. Tex., Jan. 15, 1889; 10 S. W. Rep. 452.

10. APPEAL—Review— Weight of Evidence.— Though the evidence may seem to preponderate in favor of defendant, yet, there being a substantial conflict, a verdict for plaintiff will not be disturbed, on appeal. — *Louisville, etc. R. Co. v. Adams*, Ky. Ct. App., Jan. 7, 1889; 10 S. W. Rep. 425.

11. APPEARANCE—Effect—Waiver of Defective Service. ——A general appearance by a corporation is a waiver of a defect in the service made by leaving it with one who was no longer its officer or agent. — *Birmingham Flooring Mills v. Wilder*, S. C. Ala., Jan. 11, 1889; 5 South. Rep. 307.

12. ARSON — Evidence. —— On a trial for arson, evidence was admissible of defendant's drinking liquor subsequent to the fire as bearing upon the question of guilt in tending to show what was his conduct when engaged in matters connected with the fire. — *People v. O'Niel*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 796.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS — Power of Assignor to Contract.——Any contract made by the assignor with relation to the property assigned before the settlement of the assignment cannot be enforced.— *Monteith v. Hogg*, S. C. Oreg., Jan. 15, 1889; 20 Pac. Rep. 327.

14. ASSUMPSIT— Collection of Bill of Exchange— Bona Fide Purchaser. —— Where a bill of exchange, owned by H was sent to T for collection after its dishonor, W acting as the medium of transmission, T could not resist payment of the proceeds to H, on the ground that he had paid them to W, relying on his representation of ownership. — *Frey v. Thompson*, S. C. Nev., Feb. 15, 1889; Pac. Rep. 305.

15. ATTACHMENT — Sale of Lands in Gross — Validity. —— It is error to direct a sale in gross of attached lands, which are separate tracts, and situated in different counties. The judgment should direct a sale by the tract, and only so much as necessary to satisfy the debt and costs.—*Starks v. Curd*, Ky. Ct. App., Jan. 22, 1889; 10 S. W. Rep. 419.

16. ATTORNEY AND CLIENT—Attorney's Lien. —— Under Gen. St. Ky. § 15, ch. 5, where the demand arises out of contract and is placed in the hands of an attorney, to be collected by suit or otherwise, the attorney has a lien.—*Rowe v. Fogle*, Ky. Ct. App., Jan. 10, 1889; 10 S. W. Rep. 426.

17. BAILMENT — For Benefit of Bailor. —— Bailments for the benefit of the bailor *depositum* or *mandatum*, are founded upon express contract, and require the assent of the bailee to make him responsible.—*Heatherington v. Richter*, W. Va. Ct. App., Dec. 14, 1888; 8 S. E. Rep. 609.

18. BANKRUPTCY—Suits Against Assignee—Limitation. ——Rev. St. U. S. § 5057, providing that no suit shall be maintainable between an assignee in bankruptcy and a person claiming an adverse interest, unless brought within two years from the accrual of such cause of action, applies to a petition by the grantee of such an assignee to establish title under the "Burnt-Record Act," (Rev. St. Ill. 1874, ch. 116.) — *Gage v. Du Puy*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 878.

19. BANKS AND BANKING—Collections — Acceptance of Check. —— The defendant bank sent a check, drawn by W, and deposited with it by plaintiff for collection, to the bank upon which it was drawn, and accepted a cashier's check for it, but the cashier's check was not paid, owing to the subsequent insolvency of the drawee: *Held*, that the defendant was liable to the plaintiff for the amount of the check. — *Fifth Nat. Bank v. Ashworth*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 596.

20. BASTARDY—Fine— Payable to Officers of Court.—— Code Ga. § 4564, providing that the putative father of a bastard child, failing to pay for its support, should be indicted for misdemeanor, is amended by act March 20, 1866, making the penalty for the offense a fine of not more than $1,000, imprisonment, and work in a chain-gang.—*Hardeman v. McManus*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 733.

21. BENEVOLENT SOCIETIES — Rights of Subordinate Lodge. —— Where a subordinate lodge is incorporated under the State laws, its suspension by the grand lodge has no effect on its legal existence. — *Merrill Lodge No. 299, I. O. G. T. v. Ellsworth*, S. C. Cal., Jan. 28, 1889; 20 Pac. Rep. 399.

22. BRIDGES—Assignment by State Board — Res Adjudicata. —— Though the State board is empowered to assess toll-bridges, its determination that a bridge is a toll-bridge is not conclusive.— *State v. Tillery v. H. & St. J. R. Co.*, S. C. Ms., Feb. 4, 1889; 10 S. W. Rep. 436.

23. CHATTEL MORTGAGE — Equitable Assignment Pro Tanto.——Defendant, a chattel mortgagee, sold one of the secured notes to complainant, and agreed to assign the mortgage to him *pro tanto: Held*, that complainant, by payment of the note, acquired to that extent an equitable interest in the mortgage, and was entitled in equity to recover of defendant the amount of such payment.—*Holway v. Gilman*, S. J. C. Me., Jan. 8, 1889; 16 Atl. Rep. 543.

24. CHATTEL MORTGAGES—Recording—Purchaser with Notice. —— One who purchases the mortgaged property with knowledge of the mortgage, cannot set up as against the mortgagee the fact that the mortgage is not made and recorded in accordance with the laws of Washington territory. — *Darland v. Lewins*, S. C. W. T., Jan. 29, 1889; 20 Pac. Rep. 309.

25. COMPROMISE—Actions on Settlement.——A party can maintain an action for the recovery of an unpaid balance of a sum agreed upon in settlement of a large sum.— *Leichsenring v. Allen*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 332.

26. CONFLICT OF LAWS— Sale of Real Estate — Lex Rei Sitæ.——The rights and obligations of the parties to a

sale executed in one State of real estate situated in another must be determined under the laws of the State in which the property is situated. — *Succession of Cassidy*, S. C. La., Jan. 9, 1889; 5 South. Rep. 292.

27. CONTINUANCE—Absence of Witness—Affidavit.—— An affidavit for a continuance must show that issues will arise upon the trial upon which the testimony of the absent witness will be material. — *Hewes v. Andrews*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 338.

28. CONTRACTS— Construction — Sale. —— *Held*, that the contract in question constituted a sale of all the articles mentioned therein and not a lease. — *Montooth v. Gamble*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 594.

29. CONTRACT—Option — Acceptance. —— An offer to sell land at a stated price and within a certain time if accepted within the certain time is binding and can be enforced. — *Weaver v. Burr*, W. Va., Ct. App., Dec. 15, 1888; 8 S. E. Rep. 743.

30. COSTS—Security—Person — Foreign Republic.—— The republic of Honduras is a "person," within the meaning of Code Civil Proc. N. Y. § 3268, providing that a plaintiff who is "a person residing without the State," or "a foreign corporation," may be required to give security for costs. — *Republic of Honduras v. Soto*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 845.

31. CRIMINAL LAW—Continuance.—— Where defendant and another were separately indicted for the same offense, defendant is not entitled to a continuance on an application that such other defendant be first tried under Code Crim. Proc. Tex. art. 669a.—*Standard v. State*, Tex. Ct. App., Nov. 21, 1888; 10 S. W. Rep. 442.

32. CRIMINAL LAW—Evidence—Opinion as to Guilt.—— Testimony by a witness that when he first heard of the murder he said that defendant committed it is inadmissible.—*Woolfolk v. State*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rpp. 724.

33. CRIMINAL LAW—Evidence— Character. —— Testimony that a witness had learned since defendant's arrest that his reputation before arrest was bad is inadmissible. — *People v. Fong Ching*, S. C. Cal., Jan. 28, 1889; 20 Pac. Rep. 396.

34. CRIMINAL LAW—Evidence—Dying Declarations.—— A charge of the court that dying declarations were to be considered by the jury "just as though deceased had been sworn and put on the stand and testified as a witness to the words used in his dying declaration" was not erroneous.— *Kennedy v. State*, S. C. Ala., Dec. 18, 1888; 5 South. Rep. 300.

35. CRIMINAL LAW — Homicide — Evidence of Accomplice. —— *Held*, under facts, that there was sufficient evidence that witness was an accomplice in the crime charged, to make a refusal to charge upon the weight of accomplice, testimony error. — *Hines v. State*, Tex. Ct. App., Jan. 26, 1889; 10 S. W. Rep. 448.

36. CRIMINAL LAW—Instructions — Objections Waived. —— Where a charge giving the abstract law of manslaughter is not objected to at the time, a conviction will not be set aside unless it appears or seems probable that defendant was injured. — *Miller v. State*, Tex. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 445.

37. CRIMINAL LAW — New Trial — Newly-discovered Evidence. —— A new trial will not be granted on account of newly-discovered evidence that the deceased was seen to raise a dagger to strike the defendant at the time of the homicide, where the defendant and another witness had testified to the same effect.—*People v. O'Brien*, S. C. Cal., Dec. 29, 1888; 20 Pac. Rep. 359.

38. CRIMINAL LAW—Trial— Instructions. —— It is not error to charge that the jury are presumed to know the character of the witnesses, having been drawn from the vicinage for that reason.—*State v. Jacob*, S. C. S. Car., Feb. 12, 1889; 8 S. E. Rep. 696.

39. DAMAGES—Breach of Contract — Liquidated Damages. —— Defendants agreed to pay, as liquidated damages, "five dollars per day for each day after the 22d day of June that this contract remains unfulfilled:" *Held*, that plaintiffs had no right of action for any damages resulting from delay, beyond the stipulated five dollars per day.— *Welch v. McDonald*, Va. Ct. App., Nov. 22, 1888; 8 S. E. Rep. 711.

40. DEEDS—Construction—Nature of Estate Conveyed. —— Under a deed of land to a married woman for her natural life, and after her death to her children or their representatives, and in case of her death or leaving no children or representatives of children, to her husband in fee, the husband takes a contingent remainder. — *Morse v. Proper*, S. C. Ga., Jan. 21, 1889; 8 S. E. Rep. 625.

41. DEPOSITIONS — Exceptions to Admission. —— An exception to the admission of a deposition *de bene esse*, because it does not appear to have been taken in conformity with all the regulations of the act to provide for the taking of such depositions, approved Dec. 22, 1883, is too general. — *Bulwinkle v. Cramer*,, S. C. S. Car., Feb. 14, 1889; 8 S. E. Rep. 689.

42. DESCENT AND DISTRIBUTION — Adjudication of Heirship— Continuance. —— The fact that a petition has been filed, and citation issued thereon under Code Civil Proc. Cal. § 1664, is no ground for a continuance of proceedings by the executor of the estate for final distribution, begun on the day citation issued on said petition.— *In re Ozarart's Estate*, S. C. Cal., Jan. 12, 1889; 20 Pac. Rep. 367.

43. DRAINAGE — Assessment. —— Under § 13, of Ind. drainage act of April 6, 1885: *Held*, that for repairs made upon a ditch under the act of 1883, a township trustee could make an assessment according to the provisions of such act after the passage of the act of 1885. — *Geiger v. Bradley*, S. C. Ind., Jan. 25, 1889; 19 N. E. Rep. 760.

44. DRAINAGE—Objections to Assessment—Waiver.—— Under the Illinois drainage act of 1885, the objection that the commissioners failed to classify certain lands, and to indicate whether they were or were not benefited, is waived unless made before the commissioners. It cannot be raised on an application for judgment on an assessment. — *People ex rel. Barber v. Chapman*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 872.

45. EJECTMENT— Pleading — Cause of Action. —— A complaint alleging that plaintiffs are the owners of, and entitled to the immediate possession of, a certain lot of land, described by metes and bounds, and that defendant has erected buildings which project several inches over and upon plaintiff's lot, states a good cause of action in ejectment under Code Civil Proc. N. Y. § 3343, subd. 20.—*Leprell v. Kleinschmidt*, N. Y. Ct. App., Feb. 8, 1889; 19 N. E. Rep. 812.

46. EMINENT DOMAIN—Payment—Restoration of Property.——Construction of Code Civil Proc. Cal. § 1263, as to restoration of property taken for the purpose of a reservoir.—*San Diego Co. v. Neale*, S. C. Cal. Dec. 31, 1888; 20 Pac. Rep. 380.

47. EQUITY — Alteration of Instruments. —— Equity will not lend assistance in reforming an instrument to one who altered it for a fraudulent purpose.— *Respess v. Jones*, S. C. N. Car., Feb. 18, 1889; 8 S. E. Rep. 770.

48. EQUITY — Failure to Plead — Submission to Jurisdiction. —— In equity, a defense of another action pending is never available unless pleaded, and the silence of the answer amounts to a submission of the issues to the judgment of the court.—*Hollister v. Stewart*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 782.

49. EQUITY — Hearing on Bill and Unsworn Answer. —— Where a hearing is on bill and unsworn answer the complainant is not entitled to relief unless so entitled on the admitted allegations of the bill. — *Reese v. Barker*, S. C. Ala., Jan. 17, 1889; 5 South. Rep. 305.

50. EQUITY—Jurisdiction— Specific Performance.—— Equity will not enforce a contract for personal acts involving labor, skill and judgment for the breach of which the remedy at law is adequate.— *Campbell v. Rust*, Va. Ct. App., Feb. 9, 1889; 8 S. E. Rep. 664.

51. EQUITY—Rescission.—— Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not con-

stitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. § 1689. — *Lawrence v. Gayetty*, S. C. Cal., Jan. 15, 1889; 20 Pac: Rep. 382.

52. EVIDENCE—Admissibility — Maps for Comparison. ——In an action for price of a book which was to contain "a map of the city, showing parks, cemeteries," etc., a map of the city which a city engineer had testified was an accurate one, is admissible to determine whether the map in the book is accurate. — *Munsell v. Baldwin*, S. C. E. Conn., Oct. 12, 1888; 16 Atl. Rep. 546.

53. EXECUTORS AND ADMINISTRATORS— Assets.——In an action by an administrator to recover assets of the decedent, the evidence showed that the property in controversy did not belong to the decedent.— *Palmer v. Kingsford*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 615.

54. EXECUTORS AND ADMINISTRATORS — Sale of Decedent's Lands — Consent of Guardian. —— Under Ind. statutes a sale of the land of a decedent of whom his insane widow is an heir, under decree of court, after the written conset of her guardian, is valid. — *Smock v. Reichwine*, S. C. Ind., Jan. 30, 1889; 19 N. E. Rep. 776.

55. EXECUTION—Validity—Issuance.——An execution issued on a judgment after the lapse of ten years from the date of the last execution is voidable only on proceedings by the execution defendant or third persons who have acquired rights prior to its issue.— *Leonard v. Brewer*, S. C. Ala., Jan. 11, 1889; 5 South. Rep. 306.

56. FISHERIES—Oyster beds— Adverse Possession.—— When an oyster-bed has been designated under Gen. St. Conn. § 2348, to an individual in violation of § 2370, prohibiting the designation of oyster-beds, the grantee can gain no rights in it by adverse possession, the title being in the State. — *Town of Clinton v. Bacon*, S. C. Err. Conn., June 26, 1888; 16 Atl. Rep. 548.

57. FRAUDULENT CONVEYANCE. —— Defendant being indebted to the complainant conveyed certain property to his wife and after the conveyance he continued the business in his own name holding himself out as the owner: *Held*, that the conveyance was fraudulent as to complainant.— *First Nat. Bk. v. Loper*, N. J. Ct. Chan., Feb. 7, 1889; 15 Atl. Rep. 538.

58. FRAUDULENT CONVEYANCE— Action to Set Aside — Evidence. —— In an action to set aside deed on the ground that the debtor was the real purchaser, his wife, in whose name the title was taken, cannotjtestify to statements of the husband to her of the reasons for so taking the title. — *Watson v. Young*, S. C. S. Car., Feb. 13, 1889; 8 S. E. Rep. 706.

59. FRAUDULENT CONVEYANCE—Consideration—Promissory Note. —— A negotiable promissory note is a valuable consideration for a deed, especially where the insolvency of the maker is not shown. — *Weaver v. Nugent*, S. C. Tex., Dec. 11, 1888; 10 S. W. Rep. 458.

60. GIFTS—Donatio Causa Mortis— Delivery.—— A gift of certain bonds by one a short time before his death will not be sustained, where they were not delivered, nor the means of obtaining them. — *Yancey v. Field*, Va. Ct. App., Feb. 14, 1889; 8 S. E. Rep. 721.

61. GIFTS—Inter Vivos—Evidence. —— A son produced a check signed by his mother dated some months before her death, at a time when she was seventy-six years old and her brain was partly paralyzed: *Held*, that burden was on him to establish the gift. — *Parker's Admr. v. Parker's Admx.*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 537.

62. HUSBAND AND WIFE —Conveyances Between.—— Before act Ala. Feb. 28, 1887, a conveyance by a husband directly to his wife was absolutely void at law. — *Maxwell v. Grace*, S. C. Ala., Jan. 15, 1889; 5 South. Rep. 320.

63. HUSBAND AND WIFE— Wife's Separate Estate.—— A conveyance by a married woman of her separate estate is void even though her trustee did not join therein.—*Alexander v. Davis*, S. C. N. Car., Feb. 18, 1889; 8 S. E. Rep. 768.

64. HUSBAND AND WIFE— Wife's Separate Property — Clothing. —— Ordinary and necessary clothing provided for a wife by the husband, in discharge of his duty growing out of the marital relation, does not constitute a gift from the husband, within the meaning of Code Ala. § 2351, defining property which may become the wife's separate estate, and including property acquired by "gift from a contract with the husband." — *Richardson v. Louisville & N. R. Co.*, S. C. Ala., Jan. 14, 1889; 5 South. Rep. 308.

65. INDICTMENT—Return — Power of Solicitor General. ——The solicitor general has no legal authority to return into court a special presentment or indictment found by the grand jury.— *Bowen v. State*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 736.

66. INSOLVENCY — Examination. —— It is not within the discretion of the court to fix the time for the examination of a debtor arrested on execution. — *First Nat. Bk. v. Gogin*, S. J. C. Mass., Feb. 4, 1889; 19 N. E. Rep. 780.

67. INTOXICATING LIQUORS — Illegal Sales — Evidence. —— Evidence in the case held sufficient to warrant a conviction for illegally maintaining a public bar.—*Commonwealth v. Powderly*, S. J. C. Mass., Feb. 8, 1889; 19 N. E. Rep. 781.

68. JUDGMENT—Collateral Attack—Insanity of Defendant. —— A decree against an insane person is valid when collaterally attacked when the complainant brings his suit in ignorance of the defendant's insanity. — *Maloney v. Dewey*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 848.

69. JUDGMENT—Res Adjudicata.—— If the record of a former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter once for all. — *Solly v. Clayton*, S. C. Colo., Dec. 3, 1888; 20 Pac. Rep. 351.

70. JUDICIAL SALES—Report of Commissioner. —— A commissioner's report which does not show for what price the land sold, or that he offered to sell less than the whole tract to pay the debts for which it was liable, will be set aside.—*Haney v. McClure*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 427.

71. JUSTICE OF THE PEACE— Waiver. —— Under Gen. St. Conn. § 676, authorizing parties by consent in writing to waive a disqualification of a justice of the peace, such waiver must be in writing, and is not effected by proceeding to trial without objection, even with knowledge of the disqualification. — *Keeler v. Stead*, S. C. Err. Conn., June 2, 1888; 16 Atl. Rep. 552.

72. LIBEL AND SLANDER — Charge of Attempt to Murder—Evidence —— Evidence of pecuniary loss is unnecessary to a right of action for a libelous charge of attempt to commit murder. — *Republican Pub. Co. v. Miner*, S. C. Colo., Dec. 4, 1888; 20 Pac. Rep. 345.

73. LIMITATION OF ACTIONS — Running of Statute.—— The statute of limitation applies to the presentation of claim against a decedent's estate to the orphans' court as well as to an action in a court of law. — *Appeal of Keyser*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 577.

74. MALICIOUS PROSECUTION—Want of Probable Cause —Evidence.——In an action for malicious prosecution, plaintiff's discharge by the criminal court is not evidence of want of probable cause. — *Thompson v. Rubber*, S. C. Err. Conn., Oct. 9, 1888; 16 Atl. Rep. 554.

75. MASTER AND SERVANT—Injury to Fireman — Negligence of Railroad Company—Evidence.——In an action against a railroad company for injuries to a fireman by the derailment of a locomotive, caused by an obstruction on the track, testimony of the engineer as to the necessity for track-walkers is inadmissible. — *Denver S. P. & P. R. Co. v. Wilson*, S. C. Colo., Dec. 3, 1888; 20 Pac. Rep. 340.

76. MINES AND MINING—Patents—Dismissal of Adverse Claim.—— One whose adverse claim has been dismissed cannot contend that the patent is void because the receiver of the public land-office accepted the purchase price and gave his receipt while the suit was pending.— *Deno v. Griffin*, S. C. Nev., Feb. 8, 1889; 20 Pac. Rep. 308.

77. MORTGAGES—Foreclosure — Action to Set Aside. — —— A judgment in foreclosure, and the proceedings

thereunder, will not be set aside as void, where the mortgagor stood by and saw the property sold, and for nearly four years saw the property greatly increasing in value, and being sold from time to time to purchasers in good faith. — *Bryan v. Kales*, S. C. Ariz., Feb. 15, 1889; 20 Pac. Rep. 311.

78. MORTGAGES—Foreclosure — Parties. —— In a suit to foreclose a mortgage, the trustee in whom is the legal title is an indispensable party, and the objection that he has been omitted is available at any time and in any form.—*Hambrick v. Russell*, S. C. Ala., Jan. 9, 1889; 5 South. Rep. 296.

79. MORTGAGES—Foreclosure—Redemption. ——Under Mo. acts 1845, and 1855, declaring the personal representatives of a mortgagor after his death shall be defendants in a foreclosure, the grantee of a devisee of the mortgagor is not a necessary party to a foreclosure suit after the mortgagor's death and is not entitled to redeem.— *Tierney v. Spiva*, S. C. Mo., Feb., 4, 1889; 10 S. W. Rep. 433.

80. MORTGAGES — Waiver of Homestead — Void for Usury.——A waiver by one executing a mortgage of the right to homestead and exemption, is of no effect if usury enters into the transaction.— *Small v. Hicks*, S. C. Ga., Jan. 23, 1889; 8 S. E. Rep. 628.

81. MUNICIPAL CORPORATION — Police Department — Dismissal of Officers. —— The city council of Denver adopted a resolution honorably discharging eighteen policemen. At the same session a resolution was adopted to add to the police force twenty patrolmen: *Held*, that one who was discharged in pursuance of the first resolution, and was not subsequently employed under the resolution increasing the force, could not complain.—*Hudson v. City of Denver*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 329.

82. MUNICIPAL CORPORATIONS — Taxation — Natural Gas Pipes. —— Gas pipes owned by a corporation to supply natural gas to consumers in Pittsburg, as such are not taxable by the city either as land or capital stock, under act Pa. May 5, 1841.—*Appeal of Pittsburgh*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 621.

83. NEGLIGENCE—Tug Landing Tow. —— *Held*, under facts that the tug was negligent in landing the canal-boat and that the latter was not so weak as to require notice of that fact to the tug.— *O'Neil v. The North*, U. S. D. C. (N. Y.), Dec. 21, 1888; 37 Fed. Rep. 270.

84. NEW TRIAL—Discretion of Trial Court — Power of Supreme Court. —— Colorado act of 1885, relating to new trials, does not deprive the supreme court of the power to reverse when the ground for the motion does not in fact exist, or is not a legal ground, or is the result of the applicant's own negligence.— *Clifford v. Denver S. P. & P. R. Co.*, S. C. Colo., Dec. 27, 1888; 20 Pac. Rep. 333.

85. PARTNERSHIP — Action Against Summons. ——A partnership cannot be sued as such. The names of its members must be set out in the complaint and summons.—*Dunham v. Schindler*, S. C. Oreg., Jan. 15, 1889; 20 Pac. Rep. 326.

86. PARTNERSHIP — Action on Sealed Note—Ratification.——In an action against one member of a firm on a sealed note executed by his partner in the firm name, a charge that it was necessary that he should know its character before ratification could be made, is proper. —*Hull v. Young*, S. C. S. Car., Feb. 9, 1889; 8 S. E. Rep. 695.

87. PARTNERSHIP—Share in Profits.——A person may be liable as partner though by the articles of partnership he is to receive no share of the profits. — *Reab v. Pool*, S. C. S. Car., Feb. 13, 1889; 8 S. E. Rep. 703.

88. PATENTS—License.——A license which authorizes the making of the patented article for a fixed period is a vested right and is not revocable. — *Scott v. Robertson*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 851.

89. PAYMENT—Presumption—Laches. ——*Held*, under facts, that it would be inequitable to enforce a twenty-two year old judgment lien against the estate of the judgment debtor. — *Scott's Admr. v. Isaacs*, Va. Ct. App., Jan. 31, 1889; 8 S. E. Rep. 678.

90. PHYSICIANS AND SURGEONS — Suitable Graduate —— The words "suitable graduate in medicine," as used in act Cal. § 26, subd. 5, mean a person legally licensed to practice medicine under the laws of the State, and are not confined to college graduates.— *People ex rel. v. Eichelroth*, S. C. Cal., Jan. 19, 1889; 20 Pac. Rep. 364.

91. PLEADING—Ambiguity — Bar of Limitations. —— A complaint is not demurrable for ambiguity and uncertainty because it might appear on the proofs that some part of the damages claimed was barred by limitation.— *Doe v. Sanger*, S. C. Cal., Jan. 25, 1889; 20 Pac. Rep. 366.

92. PLEADING—Negligence—Amendment.——If plaintiff sees that the evidence does not prove the charge of negligence made in his petition he may amend to meet the evidence.— *Hill v. Callahan*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 730.

93. PRACTICE IN CIVIL CASES— Rule to Tax Costs— Interlocutory Order. —— A rule to tax costs, and judgment thereon, are interlocutory, and form parts of the original proceedings. — *State ex rel. Cunningham v. Lazarus*, S. C. La., May 29, 1888; 5 South. Rep. 289.

94. PRINCIPAL AND SURETY — Liability of Surety — Estoppel.——The sureties in an official bond are estopped from denying the appointment of the principal to the office, where such appointment is recited in the bond, and due execution of the bond is admitted. — *People v. Huson*, S. C. Cal., Jan. 25, 1889; 20 Pac. Rep. 369.

95. PUBLIC LANDS—Death of Patentee—Issue of Patent. —— A patent issued in the name of a deceased person, on a survey made after his death, is valid, under Gen. St. Ky. art. 1, ch. 50, providing that, when a patent is issued to a person who is dead at the time, the heirs of the patentee shall hold as if the patent had been issued to them.— *Cox v. Prewitt*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 432.

96. PUBLIC LANDS — Rights of Pre-emptor to Question Patent. —— A pre-emptor is so far in privity with the United States, under whose laws he has settled on the land, that he may attack a patent of said land.— *Foss v. Hinkell*, S. C. Cal., Jan. 28, 1889; 20 Pac. Rep. 393.

97. PUBLIC LANDS—Title From State — Filing Caveat—— Code Civil Proc. Ky. § 473, providing that, if any person obtains a survey of land to which another claims a better right, such other may enter a *caveat* to prevent the issuing of a grant until the right be determined, applies only to vacant lands. — *Alexander v. Noland*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 423.

98. RAILROAD COMPANIES—Failure to Stop at Station—Measure of Damages. —— An instruction that the jury should "award damages in their discretion, not exceeding in all five thousand dollars," etc., is proper as an instruction on punitive damages.—*L. & N. R. Co. v. Ballard*, Ky. Ct. App., Jan. 22, 1889; 10 S. W. Rep. 429.

99. RAILROAD COMPANIES—Injury to Person on Track. ——The plaintiff's decedent was killed on the track at a considerable distance from a crossing in the country: *Held*, that company was not liable as it had exclusive use of track where killing occurred. — *John's Admr. v. Louisville R. R. Co.*, Ky. Ct. App., Jan. 26, 1889; 10 S. W. Rep. 417.

100. RAILWAY COMPANIES—Negligence. —— It is negligence to attempt to board a train moving at the rate of six miles an hour and one cannot recover for injuries so received. — *Hunter v. C. & S. V. R. Co.*, N. Y. Ct. App., Feb. 8, 1889; 19 N. E. Rep. 820.

101. RECEIVERS — Liability for Taxes. —— A receiver of property of a decedant's estate, which is in litigation, may be required to list and pay the taxes upon it. —*Spalding v. Commonwealth*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 420.

102. REFERENCE—In Action at Law.——When counterclaims to an action to recover on promissory notes are stricken out, leaving the action only an ordinary one at law, no reference to a master should be made.—*Latimer v. Sullivan*, S. C. S. Car., Feb. 8, 1889; 8 S. E. Rep. 689.

103. SET-OFF AND COUNTER-CLAIM — Order Accepted

but not Paid.—— Where an order given for a debt and accepted by the drawee is not paid, and is surrendered to the maker, who gives his note in lieu thereof, the drawee cannot set-off such order in an action against him by the maker. — *Taylor Mfg. Co. v. Key*, S. C. Ala., Jan. 10, 1889; 5 South. Rep. 303.

104. SPECIFIC PERFORMANCE—Contract—Construction. ——In an action for the specific performance of a promise to convey: *Held*, that the plaintiff had substantially performed his part of the contract and the performance would be decreed.—*Gray v. Suspension Co*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 874.

105. STATUTES—Change of Degree of Offense— Punishment.—— Where the punishment for an offense is not altered in kind, but the degree is diminished, the punishment prescribed by the new act must be imposed on conviction for an offense committed before its enactment. — *State v. Cooler*, S. C. S. Car., Feb. 8, 1889; 8 S. E. Rep. 692.

106. STREET RAILROADS— Change of Motor Power.—— Plaintiff was incorporated under Laws N. Y. 1850, ch. 140, § 28, subd. 7: *Held*, that such statute did not give plaintiff the right to change its motive power to a subterranean cable. — *People v. Third Ave. R. Co.*, N. Y. Ct. App., Feb 8, 1889; 19 N. E. Rep. 831.

107. TAXATION— Debts Owned by Non residents. —— From a treasurer's return not showing that any of the evidence of debt are held by non-residents, it will be implied that they are all held by residents. — *Commonwealth v. Chester*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 591.

108. TAXATION—Legislative Powers.——The legislature has power to fix the face value of corporate obligations, as their value for taxing purposes. — *Commonwealth v. Del. Canal Co.*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 584.

109. TAXATION—Levy by County Court—Validity.—— Under Rev. St. Mo. 1879, §§ 6798, 6801, authorizing the county court to levy certain taxes without an order of the circuit court, and prohibiting it from levying any other tax except by such order, a tax not of the former class, levied without such order, is void. — *State ex rel. Givens v. Wabash, St. L. & P. Ry. Co.*, S. C. Mo., Feb. 4, 1889: 10 S. W. Rep. 434.

110. TAXATION — Private Corporations — Building on Public Square. —— *Held*, under facts, that the interest of plaintiff in a building was the property of a private corporation and liable to county taxation under act Pa. April 15, 1834, requiring all houses, etc., to be assessed.—*Allegheny Co. v. Market*, S. C. Penn., Jan 7, 1889; 16 Atl. Rep. 619.

111. TOWNS— Liability of Township Trustee — Action Against.——When a township trustee, without authority, has laid out a road and the county commissioner has voted to said trustee the whole amount expended, to be applied by him to reimburse said road fund, and he has actually made that application, the township cannot sue on his bond for the cost of said bridge, on the ground that the bridge is so badly constructed as to be useless. — *State ex rel. Marks v. Vogel*, S. C. Ind., Jan. 30, 1888; 19 N. E. Rep. 773.

112. TRADE-MARKS — "Iron Bitters." —— The words "Iron Bitters" being indicative of the composition of the article so called, cannot be claimed as a trade mark. —*Brown Chemical Co. v. Stearns*, U. S. C. C. (Mich.), Jan. 7, 1889; 37 Fed. Rep. 360.

113. TRESPASS—Malicious Trespass—Statutes.——Act March 30, 1860, Penn., defining malicious trespass, giving justices of the peace final jurisdiction therein is repealed by act June 8, 1881, in so far as it differs from latter act.—*Hofman v. Commonwealth*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 609.

114. TRESPASS—Pleading—Estoppel. —— Defense of estoppel may be raised in trespass to try title under a plea of not guilty.—*Dooley v. Montgomery*, S. C. Tex., Jan. 15, 1889; 10 S. W. Rep. 451.

115. TRUSTS — Enforcement — Jurisdiction in Equity—— Under Const. Ill. art. 6, § 12, providing that "circuit courts shall have original jurisdiction of all cases in law or equity," the legislature cannot take away jurisdiction of a case involving the enforcement of a trust. —*Howell v. Moores*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 863.

116. TRUST — Evidence to Establish — Conveyance to Son. —— Where a father purchases land, and has it conveyed to his son, the presumption is that the purchase was intended to be an advancement or gift to the son, and no trust results in favor of the father. — *McClintock v. Loisseau*, W. Va. Ct. App., Dec. 8, 1888; 8 S. E. Rep. 612.

117. TRUSTS — Sale of Minor's Interest. —— A trust-estate in which minors are the beneficiaries cannot be legally sold on the petition of the trustee, unless the minors are made parties by a representative properly appointed. — *East Rome Town Co. v. Cothran*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 737.

118. TRUSTS—Witness—Competency. —— S conveyed land to a trustee, to the use of S for life, then to his wife for life, remainder to their children living at the death of the wife in fee. In a suit by two of the children to establish a trust in the land itself, after the mother's death, plaintiffs are not competent to testify to declarations of the mother tending to show recognition of the trust.— *McDevitt v. Frantz*, Va. Ct. App., Feb. 8, 1889; 8 S. E. Rep. 642.

119. VENDOR AND VENDEE— Action for Fraud—Failure of Title. —— Where a vendee of land is sued for the purchase money he can defend on ground of failure of title only by showing a complete failure or a failure of such title of the vendors represented they had at time of sale.—*Fisher v. Dow*, S. C. Tex., Jan. 18, 1889; 10 S. W. Rep. 455.

120. WILLS—Construction.——A devised land for the use of B and C; at the death of B to be divided between C and three other grandchildren. If C died without heirs, her share to go to the three grandchildren: *Held*, a suit in partition after the death of C without heirs, while B still lived was prematurely brought. — *Swanson v. Calhoun*, S. C. Ga., Feb., 11, 1889; 8 S. E. Rep. 734.

121. WILLS—Construction— Estate Conveyed. —— A testator in his will gives a number of legacies to each of his children except his son S, each bequest ending with words "and no more" lastly a devise to S of all his realty, omitting the clause "and no more:" *Held*, S took a fee.—*Doe v. Patten*, Del. C. Err. App., Jan. 16, 1889; 16 Atl. Rep. 558.

122. WILLS—Construction— Perpetuities. —— Where by terms of will the vesting of the remainders might be postponed for more than twenty-one years after the death of the life-tenants, the rule against representatives was violated and the remainders were therefore void.—*Appeal of Coggins*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 579.

123. WILLS — Construction — Trusts for Support of Child —— Construction of a will as to provision for support of child. — *Blouin v. Phaneuf*, S. J. C. Me., Jan. 5, 1889; 16 Atl. Rep. 540.

124. WILLS — Decision as to Legatees — Final Order. —— In an action to determine which of three corporations is the legatee meant in a will, an order awarding the legacy to the executors as part of the residuary fund and determining that neither claimant is entitled thereto, is not a final distribution from which an appeal can be taken by one of the claimants.—*In re Casement's Estate*, S. C. Cal., Jan. 17, 1889; 20 Pac. Rep. 362.

125. WILLS — Rule in Shelly's Case. —— The rule in Shelly's case applies notwithstanding the expressed intention of the testator that the ancestor should have only a life estate.—*Van Olinda v. Carpenter*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 868.

126. WILLS — Testamentary Capacity — Burden of Proof.—— The burden of proof as to testamentary capacity is on the proponent.—*Tucker v. Sandridge*, Va. Ct. App., Dec. 13, 1888; 8 S. E. Rep. 650.

127. WITNESS—Competency.——In an action of ejectment where plaintiff claimed not to have notice of defendant's unrecorded deed: *Held*, that the grantor of defendant was competent to testify that he had informed the plaintiff of the conveyance to the defendant. —*Fitzgerald v. Williamson*, S. C. Ala., Jan. 14, 1889; 5 South. Rep. 309.